STATE OF MICHIGAN

COURT OF APPEALS

ROYAL MANAGEMENT COMPANY, LLC, JOSE EVANGELISTA, and STELLA EVANGELISTA,

Plaintiffs-Appellants,

v

MICHAEL S. SURNOW,

Defendant,

and

ORCHARD PINE INVESTMENTS, LLC, and WESTWOOD INVESTORS, LLC,

Defendants-Appellees.

UNPUBLISHED
November 19, 2013

No. 309658
Oakland Circuit Court
LC No. 2010-112697-CH

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7) and (C)(10). Because we conclude that plaintiffs' claims were barred by the applicable statute of limitations, we affirm.

In this case, plaintiffs alleged that defendants failed to properly construct, maintain, operate, control, engineer and/or design their storm water drainage systems, and that storm water runoff from defendants' properties has damaged, and will continue to damage, plaintiffs' adjacent properties. The trial court found that plaintiffs failed to state a factual or legal basis for their claims against defendant Westwood, and that the statute of limitations barred their claims against defendant Orchard Pine. The trial court also denied plaintiffs' motion for reconsideration. On appeal, plaintiffs argue that the court erred by allowing defendants to amend their pleadings to add the statute of limitations as an affirmative defense, erred by finding that the period of limitations had run, erred by denying reconsideration based on the affidavit plaintiffs submitted, and erred by failing to grant plaintiffs summary disposition under MCR 2.116(I).

We review for an abuse of discretion the trial court's decision to grant leave to amend pleadings. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

Affirmative defenses, including the period of limitations, must be raised in the first responsive pleading or they are waived. MCR 2.111(F); *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993). However, the trial court should grant leave freely to amend the pleadings if justice requires. MCR 2.118(A)(2); *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007). The court should deny leave only for particularized reasons, including undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice, or the amendment's futility. *Phinney*, 222 Mich App at 523. A party is not prejudiced by a delay merely because the new defense will cause the party to lose on the merits. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 6; 687 NW2d 309 (2004).

In this case, there was no evidence that defendants acted in bad faith or that plaintiffs were prejudiced by the delay. Accordingly, we conclude that the trial court did not abuse its discretion by allowing defendants to amend their pleadings to add the statute of limitations defense. MCR 2.118(A)(2); *Phinney*, 222 Mich App at 523; *Horn v Dep't of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996).

Next, plaintiffs argue that the trial court erred by granting summary disposition in defendants' favor on the basis of the statute of limitations defense. We review de novo a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where no facts are disputed, we also review de novo whether a cause of action is barred by the statute of limitations. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

The applicable statute of limitations is three years "after the time of the . . . injury" to plaintiffs' property. MCL 600.5805(10). Under MCL 600.5827, the period of limitations begins running at the time "the claim accrues." The claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. The claim accrues when all elements, including the element of damages, are present; however, later damages do not create a new cause of action and do not make the period of limitations start again. *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). The period of limitations starts when the plaintiff knows or reasonably should know he was injured; it does not start again if the plaintiff learns the injury is more extensive. *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995). The "wrong" is when the act and the first injury have occurred. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009).

When property damage from flooding increases in severity over time, the period of limitations begins running at the first visible injury and does not start again, regardless of how much worse the property damage becomes. *Horvath v Delida*, 213 Mich App 620, 622-626; 540 NW2d 760 (1995). This applies to claims of nuisance and trespass as well as negligence. *Terlecki v Stewart*, 278 Mich App 644, 654-655; 754 NW2d 899 (2008).

In the present case, defendant Orchard Pine built the storm water system and retaining wall by 1998. Although plaintiffs' complaint alleged that defendant failed to "properly

construct, maintain, operate, control, engineer and/or design" the storm water drainage system, plaintiffs failed to allege any specific action that defendant took or failed to take after the initial design and construction in their complaint. Plaintiffs did not contradict defendant's claims that no changes to the property increased the storm water runoff or the pressure on the retaining wall. Plaintiffs did not make any legal claims regarding the new retaining wall, which defendant constructed while this lawsuit was pending.

Plaintiffs also claim that they were not damaged by the particular problem at issue in this case until the retaining wall began failing in 2008. However, plaintiffs and their attorney complained of storm water flooding around and over the retaining wall in 2003. This is clearly established by their own correspondence. While plaintiffs suggest the property was not permanently and continuously damaged until 2008, caselaw requires only minimal property damage and does not distinguish permanent and continuous damage. See *Stephens*, 449 Mich at 534-535; *Marilyn Froling Revocable Living Trust*, 283 Mich App at 291; *Terlecki*, 278 Mich App at 657-658; *Horvath*, 213 Mich App at 625-626. Thus, because plaintiffs experienced significant flooding and damage to their property as a result of defendants' drainage system by at least 2003, plaintiffs' claim accrued and the period of limitations began running at that time. Accordingly, we conclude that the trial court did not err when it held that the statute of limitations barred plaintiffs' 2010 complaint.

Plaintiffs also argue that the trial court erred in finding that plaintiffs failed to state a factual or legal basis for their claims against defendant Westwood. Plaintiffs did not include this argument in their questions presented; therefore, we need not address this issue. MCR 7.212(C)(5); *Grand Rapids Employees Indep Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Regardless, the trial court correctly found that plaintiffs failed to state any factual or legal basis for their claims against defendant Westwood. Plaintiffs' complaint did not distinguish between the defendants, and plaintiffs did not amend the complaint after changing the second defendant to reflect correct property ownership. Even in their documentary evidence, plaintiffs only made extremely vague allegations regarding the Westwood property.

Next, plaintiffs argue that the trial court should have granted them reconsideration based on the affidavit of a former township inspector. We review for an abuse of discretion a trial court's decision to grant or deny reconsideration. *Huspen v T & H, Inc*, 200 Mich App 162, 167; 504 NW2d 17 (1993).

A trial court generally will not grant a motion for reconsideration that merely presents the same issues the court has already ruled on; rather, the moving party must demonstrate that the court and the parties have been misled by a palpable error. MCR 2.119(F). New affidavits calling into question the veracity of factual allegations can be grounds for reconsideration. See *Mich Bank-Midwest v DJ Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988). While plaintiffs submitted a new affidavit in this case, the trial court found the affidavit to be intentionally misleading regarding the affiant's status and experience, and sanctioned plaintiffs. Moreover, the affiant's assertion that the 2003 incident was limited to a catch basin issue directly contradicted plaintiffs' own correspondence describing their concerns. Moreover, nothing in the affidavit contradicted the prior evidence regarding when plaintiffs were first damaged by storm water runoff or established any new action by either defendant within three years before the

complaint was filed. Therefore we conclude that the trial court did not err in refusing to reconsider summary disposition.

Finally, we conclude that while plaintiffs are correct that under MCR 2.116(I)(2), a trial court may grant summary disposition to the opposing party if it appears that it, rather than the moving party, is entitled to judgment, *Mich Mut Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994), plaintiffs were not entitled to summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra